

In the United States Bankruptcy Court

for the

Southern District of Georgia

Savannah Division

FILED

at 1 O'clock & 30 min P. M.
Date 08/20/03

MICHAEL F. McHUGH, CLERK
United States Bankruptcy Court
Savannah, Georgia

PR

In the matter of:

RAYFORD T. BACON

BERTHA M. BACON

Debtors

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Chapter 13 Case

Number 02-40665

MEMORANDUM AND ORDER
ON DEBTORS' MOTION FOR HARDSHIP DISCHARGE

On February 28, 2002, Rayford T. Bacon and Bertha M. Bacon ("Debtors") filed a petition for relief under Chapter 13 of the Bankruptcy Code. On April 17, 2003, Debtors filed a Motion for Hardship Discharge and a hearing was held on such motion on June 17, 2003. This Court has jurisdiction pursuant to 28 U.S.C. §157(a) and (b)(1) over this core proceeding. Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

When Debtors filed their petition on February 28, 2002, they proposed to pay \$250.00 a month for 60 months. (Chapter 13 Plan and Motion). This was despite the fact that their projected monthly income exceeded monthly expenses by only \$48.35.

cc: 1. Debtor - Bacon
2. Debtor's Attorney - Pytte
3. Chapter 13 Trustee - Brown 8/20/03 PR

(Debtors' Voluntary Petition, Schedule J). Rayford Bacon listed his occupation "disability" and showed total monthly income of \$1,108.00 that came from social security and a pension. (Debtors' Voluntary Petition, Schedule I). Bertha Bacon listed her occupation "cook" and showed total monthly income of \$842.35. *Id.* In response to Debtors' petitions, Trustee filed an Objection to Confirmation noting that Debtors had included \$350.00 in proposed car payments and \$50.00 in insurance on such car in their schedule of current expenditures. On June 23, 2002, Debtors' plan was confirmed with monthly payments totaling \$750.00. Since confirmation, Debtors have become delinquent in their Chapter 13 plan payments by approximately \$5,475.00 as of July 15, 2003. (Trustee's Response to Debtors' Motion for Hardship Discharge, pg.1).

CONCLUSIONS OF LAW

The ultimate evidentiary burden to establish an entitlement to a hardship discharge under 11 U.S.C. §1328(b) rests upon the debtor. *See, e.g. Roberts v. Boyajian (In re Roberts)*, 279 F.3d 91, 93 (1st Cir. 2002); *In re Nelson*, 135 B.R. 304, 307 (Bankr. N.D. Ill. 1991). A hardship discharge is granted "only if" three essential elements are shown:

- (1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;
- (2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed

unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. §1328(b)

Debtors must persuade the Court that they have complied with each subsection of §1328(b). *See In re Dark*, 87 B.R. 497, 498-99 (Bankr. N.D. Ohio 1988) (unsubstantiated and conclusory statements regarding inability to fund plan are insufficient). If all three elements are satisfied, the granting of a hardship discharge is within the discretion of this Court and may be granted after notice and a hearing. *See In re Easley*, 240 B.R. 563, 564-5 (Bankr. W.D. Mo. 1999) (denying hardship discharge where failure to make plan payments was not due to circumstances for which debtors should not be justly held accountable); §1328(b).

When considering the first subsection of §1328, courts are split over whether or not the circumstances causing a debtor to fail to complete their plan payments must be "catastrophic." *Compare Bandilli v. Boyajian (In re Bandilli)*, 231 B.R. 836, 840 (B.A.P. 1st Cir. 1999) (holding that to obtain hardship discharge there is no requirement that debtor prove existence of "catastrophic" circumstances); *In re Edwards*, 207 B.R. 728, 730 (Bankr. N.D. Fla. 1997) (holding that §1328(b)(1) does not require a catastrophic circumstance) *with In re Cummins*, 266 B.R. 852, 855 (Bankr. N.D. Iowa 2001) (disabling injuries to

debtor-husband on two separate occasions after a plan was confirmed not an adequate reason for granting "hardship" discharge); In re White, 126 B.R. 542, 545 (Bankr. N.D. Ill.1991) (denying discharge where disability was neither permanent nor totally disabling); Nelson, 135 B.R. at 307 (loss of use of vehicle, inability of one debtor to find full-time employment and unexpected expenses not catastrophic circumstances because all reasons were economic).

Requiring that a debtor demonstrate the existence of catastrophic circumstances seems overly harsh given the fact that §1328(b)(2) requires that unsecured creditors must have received at least the amount they would have received in a liquidation under Chapter 7. Congress's use of the phrase "for which the debtor should not justly be held accountable" in §1328(b)(1) is much milder than the emotionally-laden "catastrophic."

See Bandilli, 231 B.R. at 840. Further, the "hardship discharge" provided under §1328(b) is not as broad as the "super discharge" of §1328(a) that is available for a debtor who has completed his plan payments. Instead, a "hardship discharge" more closely resembles a Chapter 7 discharge as all of the debts specified in 11 U.S.C. §523(a) are excepted. See §1328(c)(2); In re Iacovoni, 2 B.R. 256, 262-3 (Bankr. D. Utah 1980) *superseded by statute on other grounds* In re Whitelock, 122 B.R. 582, 588 (Bankr. D. Utah 1990). Accordingly, I decline to require that a debtor prove the existence of catastrophic circumstances to qualify for a §1328(b) discharge. Instead, I hold that the requirement of §1328(b)(1) has been met where: 1) debtor is unable to complete payments under a Chapter 13 plan due to a change of

circumstances for which debtor is not accountable, 2) that the change was substantial in nature, 3) that it was not foreseeable at the time of the confirmation of the plan, and 4) debtor has made every effort to overcome such circumstances but is still unable to complete his plan payments.

The determination of whether a debtor is justly accountable for his or her failure to make payments under their Chapter 13 plan is a fact-driven analysis. Debtors have argued that they are unable to complete plan payments because of Rayford Bacon's age and the fact that he has undergone a number of surgical procedures in the past year including a sextuple bypass surgery. Further, Bertha Bacon is prevented from earning any additional income because of age, lack of education and skills. While the situation of Debtors is unfortunate in the extreme, it cannot be characterized as unexpected or unforeseen. Debtors have presented no evidence that they are earning any less income today than when their plan was confirmed or even that the fragile medical condition or earning capacity of either Debtor has changed in any way. In short, Debtors have exhibited no change in circumstances that was unforeseeable at confirmation and substantial in nature so as to satisfy §1328(b)(1)

Debtors have also failed to show that modification of their plan is not practicable as required by §1328(b)(3). The Bankruptcy Code prefers modification of the plan as a solution to a debtor's problems and it should be attempted whenever it is feasible.

See White, 126 B.R. at 545 (*citing* 5 Collier on Bankruptcy, ¶ 1328.01 [2][b][ii] at 1328-17 (15th ed. 1991)).

Debtors here have argued that modification, while not impossible, would not be advantageous as it would not further the goal of saving their house. Debtors, however, are still in the early stages of their plan and there is sufficient time for modification. Further, this is not a situation where modification is not "practicable" because there is no source of income to fund the modified plan. See In re Bond, 36 B.R. 49, 51 (Bankr. E.D. N.C. 1984) (hardship discharge granted where debtor had made all payments under her plan until her death and dismissing case would have left her minor children with nothing). In an April 17, 2003, hearing on a Washtenaw Mortgage, Co.'s Motion for Relief, Debtors' attorney noted that the current plan was not feasible, but that a feasible plan could be created. This Court is not satisfied that Debtors have met their burden of showing that modifying their plan is not "practicable."

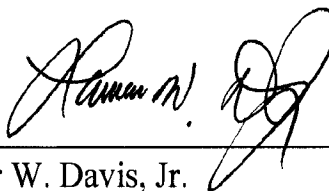
While Debtors' are not entitled to a hardship discharge based on the requirements of §1328(b), they are not without options. Having expressed no interest in modifying their plan, Debtors can instead convert their case to Chapter 7¹ or voluntarily

¹See 11 U.S.C. §1307(a)

dismiss the case.² Regardless, it is not appropriate for this Court to grant Debtors' motion given this set of facts.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS
THE ORDER OF THIS COURT that Debtors' Motion for Hardship Discharge is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 19th day of August, 2003.

²See 11 U.S.C. §1307(b)